Superior Court Rules of Civil Procedure, Rule 16.1

WEST'S DELAWARE RULES OF COURT
SUPERIOR COURT RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

Current with amendments received through 12/15/2002

RULE 16.1 ALTERNATIVE DISPUTE RESOLUTION

(a) Actions Subject to ADR. All civil actions, except those actions listed in subsection (d) hereof, (1) in which trial is available (2) monetary damages are sought (3) any nonmonetary claims are nominal and (4) counsel for claimant has not certified that damages exceed one hundred thousand dollars ($100,000) exclusive of costs and interest, are subject to compulsory alternative dispute resolution (hereinafter "ADR").

(b) Forms of ADR

(1) Arbitration. Arbitration is a process by which a neutral arbitrator hears both sides of a controversy and renders a fair decision based on the law. If the parties stipulate in writing, the decision shall be binding. Arbitration may be mandatory or by agreement.

(2) Mediation. Mediation is a process by which a trained neutral facilitates the parties in reaching a mutually acceptable resolution of a controversy. It includes all contacts between the mediator and any party or parties, until a resolution is agreed to, the parties discharge the mediator, or the mediator finds the parties cannot agree.

(3) Neutral Assessment. Neutral assessment is a process by which an experienced neutral gives a non-binding, reasoned, oral or written evaluation of a controversy, on its merits, to the parties. The neutral assessor may use mediation techniques to aid the parties in reaching a settlement and shall prepare a binding settlement agreement, if the parties consent.

(c) Choice of ADR. In all civil actions subject to ADR, the plaintiff shall select a form of ADR on the Case Information Sheet (CIS form) when a complaint is filed, and each defendant shall, in the initial pleading filed, accept or reject the plaintiff's ADR selection.

(1) If a defendant does not reject the plaintiff's choice of ADR, the court will schedule the selected ADR.

(2) If any defendant rejects the plaintiff's choice of ADR, the Court will schedule mandatory arbitration.

(d) Civil Actions Not Subject to ADR. The following civil actions shall not be referred to ADR but the parties may stipulate to a form of ADR:

(1) An action involving a matter listed in Superior Court Civil Rules 23 and 81(a);

*666 (2) A replevin, declaratory judgment, foreign or domestic attachment, interpleader, or mortgage foreclosure action;

(3) Any in forma pauperis action where the claims are substantially non-monetary; or

(4) An action to enforce a statutory penalty.

(e) Responses. Each plaintiff filing an action subject to ADR and each defendant filing a responsive pleading and/or motion shall simultaneously file the interrogatories and sworn statements required by Civil Rule 3(h) and 5(b), except:

(1) In an action in which counsel for claimant(s), or a claimant, if unrepresented, certifies to the Court that a potential defendant(s) cannot be ascertained at the time of the filing of the complaint, the case shall not be referred for ADR until ninety (90) days after the filing of all initial responsive pleadings, during which ninety (90) day period any party may conduct discovery limited to the identity of a potential defendant(s); (See Form 33).

(2) In an action in which a defendant requests a

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physical examination of a claimant, whose physical condition is in issue, and the claimant has not submitted to a physical examination at the request of that defendant prior to the filing of the complaint; but such interrogatories and sworn statements shall be filed by the defendant within ten (10) days following receipt of the physician's report by defendant.

(3) In an action in which a request for a physical examination is made at the time of filing of the initial responsive pleading, the case shall not be assigned for ADR until the physical examination has been completed or the expiration of ninety (90) days from the request, whichever first occurs; but such interrogatories and sworn statements shall be filed by the defendant within ten (10) days following receipt of the physician's report by defendant.

(4) In an action whether or not a request for physical examination is made, the defendant may issue subpoenas duces tecum pursuant to Superior Court Civil Rule 45 for records of health care providers who have provided medical care or services to the plaintiff since the date of the incident at issue in the action but not to exceed to ten (10) years prior to such date.

(f) Attachments to Pleadings. Subject to a motion to compel to be filed with the Judge assigned to the case:

(1) The party alleging personal injuries shall, within 5 days of the entry of appearance by the defendant, serve Defendant with all medical records and reports to the required response under Superior Court Civil Rule 3(h).

*667 (2) All expert witness reports which a party intends to rely upon at the ADR hearing shall be attached to the Complaint under Superior Court Civil Rule 3(a) and to the answer under Superior Court Civil Rule 5(b).

(g) Defense Medical Examination. A party answering a complaint which alleges personal injuries to a plaintiff may require a defense medical examination of the plaintiff at the answering party's cost by attaching to the answer a request for a defense medical examination, setting forth the name and business address of the physician, and the date and time of the examination. Copies of the report obtained shall be provided to all parties and the ADR Practitioner; (See Form 34).

(h) Selection of the ADR Practitioner. All actions subject to ADR pursuant to this Rule will be referred for the selected choice of ADR by the President Judge of this Court or the President Judge's designee.

(1) An ADR Practitioner for either an arbitration, mediation, or neutral assessment may be selected by agreement of the parties by a stipulation signed and filed with the Court not later than ten (10) business days after the civil action is referred to ADR; (See Form 35).

(2) The Court shall select the ADR Practitioner from a list as provided herein, if a stipulation is not filed.

(A) Arbitration -- General. The list of active arbitrators shall consist of all members of the Delaware Bar actively engaged in the practice of law for more than five years, volunteer members and retired judges of the State Judiciary.

(B) Arbitration -- Personal Injury. To the extent possible, the list of active arbitrators shall consist of those members of the Delaware Bar actively engaged in the practice of law for more than five years and who have certified, in writing, to the court that they have experience in personal injury litigation, volunteer members and retired judges of the State Judiciary.

(C) Mediation. The list of active mediators shall consist of members of the Delaware Bar who have completed 25 hours of training in conflict resolution techniques and those approved by the President Judge of the Superior Court, including volunteer members and retired judges of the State Judiciary. The Court shall establish classifications of disputes and shall provide that a person is eligible to serve as a mediator in a particular area of the law only if the person possesses additional credentials or completes additional specialized training, or both. In addition to training, the President Judge of the Superior Court may establish such further criteria for service as a mediator as is deemed necessary.

*668 (D) Neutral Assessment. The list of

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active neutral assessors shall consist only of those members of the Delaware Bar registered with and approved by the ADR Section of the Delaware State Bar Association in conjunction with the Court. In order to be approved to serve as a neutral assessor, the Practitioner shall:

(i) be a member of the Delaware Bar for at least five years;

(ii) be nominated by a member of the Delaware Bar in writing in a form approved by the ADR Section and the Court, or request, in writing, to serve as a neutral assessor;

(iii) be approved by a subsection of the ADR Section, which shall include members of the Judiciary, and the President of the Delaware State Bar Association.

(3) ADR Practitioners, when acting as such, shall be bound by Canon 3(C)(1) of the Delaware Judges' Code of Judicial Conduct.

(4) The Court shall within twenty (20) days of the referral of the case for ADR identify in writing to the parties the selected ADR Practitioner.

(i) Compensation. Unless otherwise stipulated in advance by the parties, the ADR Practitioner appointed, except nonretired members of the State Judiciary, shall receive compensation from the Prothonotary for services for a minimum of two (2) hours at the rate of $150 per hour of hearing time. Each party shall pay the party's share to the Prothonotary within twenty (20) days of notice of the appointment of the Practitioner. It is the obligation of each attorney, or any party appearing pro se, to timely pay the costs of ADR and any additional Practitioner's fee when billed. The ADR Practitioner may apply to the court for sanctions against any party who fails to timely pay any Practitioner's fee.

(j) Discovery. The parties may serve and file motions and discovery as allowed by the Superior Court Civil Rules; provided, however, that all responses thereto, except as provided for under Section (e) above, shall be stayed until a request for trial de novo is filed as provided by these Rules.

(k) The ADR hearing. Unless otherwise ordered by the Court, an arbitration shall be scheduled in consultation with the parties within thirty (30) days of appointment and held by the arbitrator within sixty (60) days after scheduling; except that, where an answering party has requested a defense physical examination, pursuant to subsection (e)(3) of this Rule, the hearing shall be scheduled within thirty (30) days of the receipt of the physician's report by the arbitrator. If the arbitrator is unable to schedule the hearing during this time period, the arbitrator shall immediately inform the Court of the scheduling problem.

(1) Unless the date of the hearing is agreed upon by all parties, the arbitrator shall give at least ten (10) days written notice of the hearing to all parties.

*669 (2) The arbitrator, in the arbitrator's discretion, may schedule an informal preliminary conference with the parties.

(3) The arbitration may proceed in the absence of any party who fails to appear, after notice, but an award of damages shall not be based solely upon the failure of a party to appear; except, where a claimant, after notice, fails to appear without just cause, the arbitrator shall enter a decision against the claimant without a hearing.

(4) The Rules of this Court may be used to compel the attendance of witnesses and production of documents.

(5) Unless waived by all parties, testimony shall be under oath or affirmation, administered by a notary public.

(6) The Delaware Uniform Rules of Evidence shall be used as a guide to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be served upon the arbitrator and all parties at least ten (10) days prior to the hearing. The arbitrator shall consider such exhibits without formal proof unless the arbitrator and the parties have been notified at least five (5) days prior to the hearing that an adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrator may refuse to receive into evidence any exhibit, a copy or photograph of which has not been served on an adverse party as

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provided herein. The arbitrator, in the arbitrator's discretion, may view or inspect exhibits or the locus involved in an action either with or without the parties and/or their attorneys.

(7) A party at its expense may, on ten (10) days prior written notice to the arbitrator and adverse party, have a recording or transcript made of the arbitration hearing.

(8) An ADR Practitioner, in the Practitioner's discretion, may adjourn the hearing for not more than ten (10) days.

(9) Each party and each attorney, unless excused by the ADR Practitioner, shall appear and participate in the arbitration hearing. A party who without being excused, fails to appear at an arbitration hearing shall not be entitled to demand a trial de novo, except upon payment of the total ADR Practitioner's fee and all Court costs incurred to date. Failure to appear and participate by any person whose attendance is required shall subject the offender to sanctions under Civil Rule 37 (d) of the Superior Court Civil Rules.

(10) The ADR Practitioner shall hear and decide all motions filed by the parties related to the case except:

***670** (A) All case dispositive motions;
(B) Motions to by-pass arbitrations; and
(C) Motions to compel production of medical records.

(11) The ADR Practitioner shall certify as part of the order that the Practitioner has not examined and is not familiar with the amount of insurance coverage, unless such was necessary for the arbitration decision, and is not disqualified under Canon 3(C)(1) of the Delaware Judges' Code of Judicial Conduct.

(A) The ADR Practitioner shall mail the original written arbitration order, mediation settlement agreement, neutral assessment settlement agreement, or notice that the case was not resolved through ADR to the Prothonotary with copies to each party within five (5) days following the close of the arbitration hearing, mediation hearing or neutral assessment conference.

(B) Upon the issuance of an arbitration order, the Prothonotary shall enter the arbitration order in an arbitration order docket.

(C) The arbitration order shall be entered as an order of judgment by any judge of the Court, upon motion of a party, after the time for requesting a trial de novo has expired. A judgment so entered shall have the same force and effect as a judgment of the Court in a civil action but shall not be subject to appeal.

(D) Within twenty (20) days after the entry of the arbitration order by the Prothonotary any party may serve and file a written demand for a trial de novo. A demand for a trial de novo is the sole remedy of any party in any action subject to arbitration under this Rule.

(i) Upon a demand for a trial de novo, the case shall be placed upon the calendar of the Court by the Prothonotary and treated for all purposes as if it had not been referred to arbitration. Any right of trial by jury shall be preserved inviolate. The stay of motions and discovery provided by this Rule shall automatically terminate upon the service and filing of a demand for trial de novo. The time for responses to motions and discovery shall commence the date of the filing of the demand for a trial de novo.

(ii) At the trial de novo, the Court shall not admit evidence that there has been an arbitration proceeding, the nature or amount of the order, nor consider any other matter concerning the conduct or outcome of the arbitration proceeding, except recorded testimony taken at the arbitration hearing may be used in the same manner as testimony taken at a deposition.

***671** (iii) If the party who demands a trial de novo fails to obtain a verdict from the jury or judgment from the Court, exclusive of interests and costs, more favorable to the party than the arbitrator's order, that party shall be assessed the costs of the arbitration, and the ADR Practitioner's total compensation. In addition, if the plaintiff obtains a verdict from the jury or judgment from the Court more favorable than the arbitration order, and the defendant demanded a trial de novo, interest on the amount of the arbitration order shall be payable in accordance with 6 Del. C. § 2301 beginning with the date of the order.

(E) In the event that no request for a trial de novo is timely filed and a judge upon motion has entered an order of judgment the Prothonotary

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shall:

(i) Record the order of judgment in the proper docket and judgment index, and

(ii) Notify each party by mail that the order has been entered as a judgment, stating the date and time of the entering of judgment, and the amount of costs assessed.

(F) Awards entered in arbitration proceedings under this Rule shall not have collateral estoppel effect in any other judicial proceedings.

(l) The ADR Conference. A mediation or neutral assessment shall be scheduled in consultation with the parties within thirty (30) days of appointment or stipulation and held by the ADR Practitioner within four (4) months after scheduling. All parties and at least one attorney for each represented party must participate in the mediation conference. Sanctions may be imposed for failure to participate in good faith. All persons necessary for the resolution of the case must be present at the mediation including an insurance adjustor possessing the authority to settle the case between the last offer and the last demand made.

(1) Before mediation begins, the Prothonotary shall provide the parties with a written statement setting forth the procedure to be followed. The parties are each required to serve upon the ADR Practitioner a Confidential Mediation Conference Statement ten (10) days prior to the scheduled mediation.

(2) Prior to the commencement of the mediation conference, the parties, their counsel, and the ADR Practitioner shall sign a written agreement which shall include the following:

(A) The rights and obligations of parties to the mediation conference; and

(B) The confidentiality of the conference.

(3) All memoranda, work products, and other materials contained in the case files of an ADR Practitioner or the Court related to the mediation are confidential. Any communication made in or in connection with the mediation which relates to the controversy being mediated, whether made to the ADR Practitioner or a party, or to any person if made at a mediation conference, is confidential. The mediation agreement shall be confidential unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding except:

*672 (A) Where all parties to the mediation agree in writing to waive the confidentiality;

(B) In any action between the ADR Practitioner and a party to the mediation for damages arising out of the mediation; or

(C) Statements, memoranda, materials, and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation conference.

(4) Each mediation conference shall be an informal proceeding. Most mediations should conclude in one conference lasting one to four hours. The ADR Practitioner shall assist the parties to reach a mutually acceptable resolution of their dispute through discussion and negotiation. The ADR Practitioner may terminate the mediation conference if the parties are unable to agree. The termination shall be without prejudice to either party in any other proceeding. The ADR Practitioner or the Court shall have no authority to impose any adjudication, sanction or penalty upon the parties based solely on their failure to reach an agreement; but the Court may impose sanctions upon any party who fails to appear for mediation or fails to negotiate in good faith at a court ordered mediation. No party shall be bound by anything said or done at the mediation conference except the settlement agreement, if a settlement is reached.

(5) If the parties involved in the mediation conference reach a settlement, the agreement shall be reduced to writing and signed by the parties, the parties' counsel, and the ADR Practitioner. Unrepresented parties to the mediation shall be encouraged by the ADR Practitioner to consult with counsel prior to executing a mediation agreement. The agreement shall set forth the settlement of the issues and the future responsibilities of each party. The agreement will be binding on all parties to the agreement and, upon filing by the ADR Practitioner, will become part of the Court record. If the parties choose to keep the terms of the

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agreement confidential, a Stipulation of Dismissal of the pending action may be filed in the alternative.

(6) In all mediations pursuant to 6 Del. C. Ch. 77 in which the ADR Practitioner is to be selected pursuant to 6 Del. C. § 7709(f), the ADR Practitioner shall be selected in a manner consistent with the provisions of this Rule. The ADR Practitioner selected pursuant to this Rule shall be entitled to compensation in accordance with 6 Del. C. § 7713 notwithstanding the provisions in this Rule.

***673** (7) If the parties involved in the mediation conference do not reach a settlement, the ADR Practitioner shall file with the Prothonotary a notice, and serve copy to each of the parties, advising that mediation was not successful and the action shall proceed as though a written demand for a trial de novo, in an arbitration under these Rules, was filed by a party.

(m) The ADR Neutral Assessment. A hearing shall be limited to two hours, unless the nature of the case makes it impractical and the parties stipulate to a longer hearing.

(1) Each of the parties shall file with the neutral assessor a Confidential Neutral Assessment Hearing Statement.

(2) The neutral assessment hearing shall be confidential, unless otherwise stipulated, in writing, by the parties.

(3) Nothing in this Rule abridges the neutral assessor's ability to conclude the assessment with a mediation, providing all the mediation rules set out above are followed.

(4) If the parties involved in the Neutral Assessment meeting do not reach a settlement, the ADR Practitioner shall file with the Prothonotary a notice, and serve copy to each of the parties, advising that Neutral Assessment was not successful and the action shall proceed as though a written demand for a trial de novo in an arbitration, under these Rules, was filed by a party.

(n) ADR Civil Immunity. All ADR Practitioners, when serving as an arbitrator, mediator or neutral assessor, shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in ADR, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another. Each ADR Practitioner shall remain bound by any confidentiality agreement signed by the parties and the Practitioner as part of the ADR.

[Amended effective January 1, 1996; January 1, 1997; December 1, 1998; July 1, 1999; June 1, 2000; December 1, 2000; July 1, 2002; August 7, 2002.]

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